

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2022] NZERA 647
3128474

BETWEEN DALIAN KEREHOMA-
ULUIAKEPA
Applicant

AND LD INTERNATIONAL
TRADING LIMITED
Respondent

Member of Authority: Leon Robinson
Representatives: Robert Morgan, advocate for the Applicant
Donny Chen for the Respondent
Investigation Meeting: 7 June 2022 at Auckland
Submissions received: 7 June 2022 from Applicant
Determination: 9 December 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Dalian Kerehoma-Uluiakepa (Mrs Kerehoma-Uluilakepa) claims that she was dismissed unjustifiably purportedly for redundancy. She also seeks to recover arrears of wages for outstanding wages and holiday pay.

[2] The parties were unable to resolve the employment relationship problem between them by the use of mediation. Mrs Kerehoma-Uluilakepa asks the Authority to resolve the problem by finding she has a personal grievance and granting her formal orders for reimbursement, compensation and arrears of wages.

The Authority's investigation

[3] For the Authority's investigation written witness statements were lodged from Mrs Kerehoma-Uluilakepa and the sole director of the Respondent Mr Donny Chen (Mr Chen). All witnesses answered questions under affirmation from me and the parties' representatives. Mr Morgan made closing submissions.

[4] This determination has been issued outside the timeframe set out at section 174C(3)(b) of the Employment Relations Act 2000 (the Act), where the Chief of the Authority considers exceptional circumstances exist. As permitted under section 174E of the Act, not all the evidence or information received has been recorded. Rather, this determination makes findings of fact and law and sets out conclusions on the issues necessary to dispose of the Applicant's claims.

The issues

[5] The issues requiring investigation and determination were:

- (a) was Mrs Kerehoma-Uluilakepa dismissed from her employment by LD International Trading Limited (LD)?; and if she was
- (b) was LD's decision to dismiss and how it acted what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred?
- (c) if LD's actions were not justified what remedies should be awarded, considering:
 - lost wages (subject to evidence of reasonable endeavours to mitigate loss); and
 - compensation under s123(1)(c)(i) of the Employment Relations Act 2000 (the Act);
- (d) if any remedies are awarded, should they be reduced (under section 124 of the Act) for blameworthy conduct by Mrs Kerehoma-Uluilakepa that contributed to the situation giving rise to her grievance?
- (e) should either party contribute to the costs of representation of the other party?

Was there a dismissal?

[6] LD operated the Zoo Eatery and Lounge (Zoo) at Henderson, Auckland. Mr Chen is its sole director. Mrs Kerehoma-Uluilakepa was employed by LD as chef de partie at Zoo from 1 April 2019.

[7] The terms of the employment were recorded in a written employment agreement and materially included employment on a casual basis paid at \$19.00 per hour reporting to Mr Chen.

[8] Mrs Kerehoma-Uluiakepa made it known to Mr Chen that she preferred not to work night shifts or weekends. She also insisted that in times of a family emergency that she be permitted to leave her work immediately without there being any question of abandonment. As well, she suffered from migraines and was unable to give notice when she was unable to work because of a migraine. For these reasons, Mr Chen felt unable to offer indefinite employment and Mrs Kerehoma-Uluiakepa was employed on a casual basis.

[9] Mrs Kerehoma-Uluiakepa now says that she was not in fact a casual employee. She says that she would work normally around 30 hours per week sometimes more. Hours were logged on the till as staff arrived and they would sign out when they finished. Mrs Kerehoma-Uluiakepa provides a spreadsheet of her fortnightly hours compiled from her payslips.

[10] Mrs Kerehoma-Uluiakepa also worked at the Glen Eden RSA as a casual.

[11] From early July 2019 Mrs Kerehoma-Uluiakepa began to work closely with the head chef Lee whom she considered inexperienced. She says there was tension in the kitchen from this time. Her hours of work became erratic and she desired stable hours. Lee would not accommodate her in that regard. She says working with Lee was extremely stressful because he shouted at staff and created anxiety for her. She considered the workplace dysfunctional.

[12] Mrs Kerehoma-Uluiakepa says that a meeting she requested to discuss the contractual three-month review did not eventuate.

[13] Mrs Kerehoma-Uluiakepa gives evidence that on Thursday 12 March 2020 at about 4.55pm Mr Chen notified her that her last day of work would be Friday 20 March 2020. She says she was shocked by that announcement as she was finishing her shift.

[14] There is this letter dated 11 March 2020:-

Dalian T Kerehoma

Due to the change of the economy of NZ and our operation accordingly, unfortunately we will not require your job position in our restaurant. From date of 11th March, we give you four weeks' notice of finishing the casual employment contact between you and us. In the next four weeks, we will contact you if we require any casual job from you, and it is up to you to accept or decline the job

according to the current contract. Thanks for your contribution in the past to the restaurant. All the best for the future!

Cheers

Owner: Donny Chen

Zoo Eatery & Lounge Henderson

[15] Mr Chen gives evidence that on the afternoon of 11 March 2020 he had a meeting with three casual staff including Mrs Kerehoma-Uluiakepa where he explained the financial difficulties that LD was experiencing and rumours, he was aware of about the continuing impact of the COVID-19 virus.

[16] Mr Chen says he made a request of Mrs Kerehoma-Uluiakepa for to reduce her hours so that more hours could be worked by Lee and said that she would also be offered nights and weekends work. It is Mr Chen's evidence that the letter dated 11 March 2020 was given to Mrs Kerehoma-Uluiakepa terminating her employment on four weeks' notice.

[17] There were farewell drinks for Mrs Kerehoma-Uluiakepa on Friday 14 March 2020.

[18] Mr Chen says that when Mrs Kerehoma-Uluiakepa returned to work on Tuesday 17 March 2020 she told him she did not want to stay as a casual worker because her friend had offered her a better paid fence or building related job. Mr Chen says that he accepted her decision to leave and wished her well.

[19] Mrs Kerehoma-Uluiakepa says she requested an exit/redundancy letter explaining the circumstances of the termination and the letter of 11 March 2020 was provided to her in accordance with that request. I consider Mr Chen's evidence on the letter is more likely correct.

[20] The letter of 11 March 2020 puts the termination of Mrs Kerehoma-Uluiakepa's employment beyond doubt. She did not leave. She was informed her employment was to be terminated on four weeks' notice. I find that Mrs Kerehoma-Uluiakepa's employment was terminated.

[21] It is submitted that Mrs Kerehoma-Uluiakepa was not actually a casual employee at all. I have examined time and wage sheets. Between November 2019 and March 2020 Mrs Kerehoma-Uluiakepa was the only chef during business hours. She regularly worked in excess of 60 hours over fortnightly periods. Mrs Kerehoma-Uluiakepa was not a casual employee by virtue of the fact that LD paid her an additional 8% on top of her total gross earnings.

[22] I conclude that Mrs Kerehoma-Uluiakepa worked with such regularity and frequency that it is not correct to describe her as a casual worker. I find that Mrs Kerehoma-Uluiakepa was not a casual employee. She was employed on an indefinite basis.

An unjustifiable dismissal

[23] The parties to an employment relationship owe each other a duty of good faith. That duty requires them to be active and constructive in maintaining a productive employment relationship and they are required to be responsive and communicative.

[24] LD was proposing to make a decision that would have an adverse effect on the continuation of Mrs Kerehoma-Uluiakepa's employment. That being so, it was required to provide her with access to information relevant to the continuation of her employment about the decision and to also provide her with an opportunity to comment on the information before the decision was made.

[25] Mrs Kerehoma-Uluiakepa's employment was terminated "due to the change of the economy of NZ and [LD's] operation" the position she was employed in was no longer required. Mrs Kerehoma-Uluiakepa was not provided with any information about the change of the New Zealand economy or LD's operations. She was also not provided with an opportunity to comment on any such information before the decision to terminate was made.

[26] Once the decision was made that Mrs Kerehoma-Uluiakepa's position was to be disestablished, there was a further consultation exercise to be undertaken, in good faith and in fairness to her. Redundancy is a last resort. A fair and reasonable employer will do all that it can to avoid redundancy.

[27] I find there was no engagement with Mrs Kerehoma-Uluiakepa about alternatives to his redundancy. She was entitled to that engagement by way of consultation with her about alternatives to redundancy. Alternatives can include retraining, early retirement, job sharing, redeployment, secondments etc. LD failed to actively investigate alternatives to redundancy and consult with Mrs Kerehoma-Uluiakepa about such alternatives. It ought to have and it was obliged to do so as a fair and reasonable employer.

[28] As a result of these failures, LD's decision to dismiss and how it acted were not what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

The result

[29] For the foregoing reasons I conclude that LD's decision to terminate Mrs Kerehoma-Uluiakepa's employment for redundancy and how that decision was made and carried out, was not what a fair and reasonable employer could have done in all the circumstances at the time. I find that Mrs Kerehoma-Uluiakepa has a personal grievance for unjustifiable dismissal.

The resolution

[30] Mrs Kerehoma-Uluiakepa is entitled to formal orders to resolve the personal grievance I have found.

[31] I must first consider whether there was any blameworthy conduct on Mrs Kerehoma-Uluiakepa's part which contributed to the situation that led to the personal grievance I have found. I find that there was no such blameworthy conduct on Mrs Kerehoma-Uluiakepa's part and there is no basis to reduce either the nature or the extent of any remedies to be provided to her.

Reimbursement

[32] Mrs Kerehoma-Uluiakepa claims reimbursement of loss wages. After her employment at LD International Trading Limited ended she continued to work at the Glen Eden RSA for five hours a week. I have seen evidence of the many jobs Mrs Kerehoma-Uluiakepa applied for following the termination of her employment. I am satisfied that she has acted to mitigate her loss.

[33] I am satisfied that Mrs Kerehoma-Uluiakepa has lost remuneration as a result of the personal grievance of unjustifiable dismissal.

[34] I consider Mrs Kerehoma-Uluiakepa ought to be reimbursed the sum of three months wages as reimbursement. I order LD International Trading Limited to pay the gross sum of \$7,380.00 (Seven thousand three hundred and eighty dollars) (30hrs x \$20.50 x 12 weeks) to Dalian Kerehoma-Uluiakepa as reimbursement and to do so within 28 days of the date of this determination.

Compensation

[35] Mrs Kerehoma-Uluiakepa gives evidence that she and her family really struggled when she lost her job at Zoo. Her husband earned \$45.43 more than the threshold for government assistance. With 62% of his nett income going to rent, and

she only having casual work, there was not much left for paying bills, feeding children and living costs.

[36] The hospitality industry was not hiring new employees during COVID lockdowns.

[37] Mrs Kerehoma-Uluiakepa went to many different food banks when her family ran out of food. She sought the assistance of a social welfare agency Care Waitakere Trust to help her family.

[38] Mrs Kerehoma-Uluiakepa says she cries a lot when she is alone because she does not want her children seeing the despair she feels.

[39] I am satisfied that Mrs Kerehoma-Uluiakepa has suffered hurt and humiliation, loss of dignity and injury to her feelings as a result of her unjustifiable dismissal. Having regard to the nature of the personal grievance and the evidence given by her, I order LD International Trading Limited to pay to Dalian Kerehoma-Uluiakepa the sum of \$15,000.00 as compensation and to do so within 28 days of the date of this determination.

Wage arrears

[40] Mrs Kerehoma-Uluiakepa claims wage arrears. The principal gross sum of \$1,076.05 is sought in respect of wages owing re the period ending 29 December 2019. I have considered a wage differential analysis provided by Mr Morgan which details the amount of \$1,073.97 as arrears of outstanding wages. I am satisfied too that a gross amount of \$242.68 is owing for holiday pay not paid, and a gross amount of \$141.06 is owed for notice short paid. I order LD International Trading Limited to pay to Dalian Kerehoma-Uluiakepa the gross sum of \$1,457.71 (One thousand four hundred and fifty-seven dollars and seventy-one cents) as arrears of wages and to do so within 28 days of the date of this determination.

Penalty

[41] As LD has failed to pay wages in accordance with the contract of employment and its legal obligations, I consider it appropriate to impose a penalty for its breach. I order LD International Trading Limited to pay a penalty of \$500.00 (Five hundred dollars) to Dalian Kerehoma-Uluiakepa and to do so within 28 days of the date of this determination.

Costs

[42] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so Mr Morgan may lodge and serve a memorandum on costs within 14 days of the date of this determination. From the date of service of that memorandum Mr Chen will have 14 days to lodge any reply memorandum. I will not consider any memorandum out of time without leave.

Leon Robinson
Member of the Employment Relations Authority